



Kimberly C. Hitchcock and Jeffrey P. Canen appeal their convictions for dealing in methamphetamine<sup>1</sup> each as a Class B felony and raise the following restated issues:

- I. Whether the trial court admitted evidence used to convict Hitchcock and Canen in violation of their state and federal constitutional rights.
- II. Whether the trial court abused its discretion in finding mitigating and aggravating factors when it sentenced Canen.
- III. Whether Canen's sentence is inappropriate based on the nature of the offense and his character.

We affirm.

### **FACTS AND PROCEDURAL THEIRTORY**

In February of 2005, Linda Boone and her grandchildren returned to her residence. Upon arrival, they noticed a strong smell of ammonia. The odor caused her grandchildren to cough and their eyes to burn. Thinking there had been an accident, Brown called the Carroll County Sheriff's Department.

Deputies Jay Shimmel and Michael Thomas arrived and smelled the ammonia. Justin Darling, Director of the Carroll County Emergency Management, arrived and also smelled the odor, which he believed to be anhydrous ammonia.<sup>2</sup> Darling used a photo ionization detector ("PID") to detect the source of the ammonia. Darling walked the area around Linda Boone's home until the PID readings began to increase on a drive leading to an adjacent cinderblock building. At the building, Darling received a signal of three organic compound parts per million. The ammonia odor was described as strong and irritating and that it would

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<sup>1</sup> See IC 35-48-4-1(a)(1).

“take your breath away.” *Tr.* at 46.

Darling concluded the cinderblock building was the source of the ammonia and decided before he entered to wear protective gear. When he returned to the building, Darling found the door open. Before he entered, he observed with his flashlight a box fan, liquid propane tank, and a heater that was on. Suspicious that the potentially explosive anhydrous ammonia was in the building, Darling decided to enter. From inside, Darling observed camp fuel, a gas mask, stripping from lithium batteries, “pill dough,” table salt, drain cleaner, and three jars of clear liquid. Darling did not remove anything, but informed Deputy Thomas that he believed the building was a working methamphetamine lab.

Deputy Thomas then rang the door of the residence closest to the cinderblock building. No one answered, but a few moments later he discovered Hitchcock and Canen unloading their vehicle. Deputy Thomas also saw another vehicle in the drive that was registered to a David Busch. Deputy Thomas asked Hitchcock where Busch was, and Hitchcock gave conflicting reports.

Deputy Kevin Hammond arrived around this time and spoke with Hitchcock. Hitchcock again gave another conflicting report on Busch to Deputy Hammond. Then, there was a report of noises coming from inside the residence. At that time, Deputy Hammond called the Carroll county prosecutor and a decision was made to make a protective sweep of the residence. The sweep lasted two to three minutes, and they did not find anyone. They

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<sup>2</sup> Witnesses described anhydrous ammonia as a very caustic chemical commonly used as a fertilizer that may cause death and generally poses a significant danger to public health and the welfare of the environment. *Appellant’s App.* at 321-22, 324, 450.

then undertook a protective sweep of the detached garage. The deputies did not find anyone but observed in plain view “foilies,” salt, camping fuel, and a blender.

After the sweeps, Deputy Thomas and Director Darling were assigned to secure a warrant to search the property. They completed the probable cause affidavit and, thereafter, a warrant was issued. During the execution of the warrant the deputies further discovered glass pipes, coffee filters containing residue that tested positive for methamphetamine, empty blister packs, a modified propane tank, drain cleaner, and salt. Further the liquid that Darling originally observed tested positive for trace amounts of methamphetamine.

The State charged Hitchcock and Canen with dealing in methamphetamine and possession of chemical regents or precursors with the intent to manufacture methamphetamine. Canen was also charged to be a habitual offender. The State eventually dropped the possession and habitual charges. Hitchcock and Canen moved to suppress all the evidence seized from their property. The trial court ruled that exigent circumstances existed to search the cinderblock building but not the residence or garage, and that based on the observations from the cinderblock building there was a sufficient basis to find probable cause necessary to issue a warrant. Hitchcock and Canen were tried together before a jury and both found guilty for dealing in methamphetamine as a Class B felony.<sup>3</sup>

The trial court held a sentencing hearing and found no aggravating or mitigating circumstances applied to Hitchcock. The trial court sentenced Hitchcock to ten years in the department of correction with four years suspended. As for Canen, the trial court found his

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<sup>3</sup> In early 2005, Indiana’s ‘presumptive’ sentence for a Class B felony was ten years with a sentencing range from four to twenty years. *See* IC 35-50-3-5.

criminal history, the nature of the offense, and the fact that he was charged as a habitual offender but the charge was dismissed as aggravators. The trial court did not find any mitigators. The trial court sentenced Canen to fifteen years in the Department of Correction with five years suspended on probation. Hitchcock and Canen now appeal.

### **DISCUSSION AND DECISION**

Hitchcock and Canen contend that the trial court erred in denying their motion to suppress evidence of drug activity obtained during a warrantless search. Hitchcock and Canen proceeded to trial where they objected to the admission of the same evidence. Once a case proceeds to trial, the question of whether the trial court erred in denying a motion to suppress is no longer viable. *Cochran v. State*, 843 N.E.2d 980, 983 (Ind. Ct. App. 2006), *trans. denied*; *Kelley v. State*, 825 N.E.2d 420, 424 (Ind. Ct. App. 2005). “A ruling upon a pretrial motion to suppress is not intended to serve as the final determination of admissibility because it was subject to modification at trial.” *Cochran*, 843 N.E.2d at 983. On appeal, Hitchcock and Canen’s only available argument is whether the trial court erred in admitting the evidence at trial. *Id.*; *Kelley*, 825 N.E.2d at 425.

We reverse a trial court’s ruling on the admissibility of evidence only when the trial court abused its discretion. *Kelley*, 825 N.E.2d at 424. An abuse of discretion may occur if a decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* Regarding the “abuse of discretion” standard generally, our Supreme Court has observed, “to the extent a ruling is based on an error of law or is not supported by the evidence it is reversible, and the trial court has no discretion to reach the wrong result.”

*Pruitt v. State*, 834 N.E.2d 90, 104 (Ind. 2005), *cert. denied*, 126 S.Ct. 2936, 165 L.Ed.2d 962 (2006).

## **I. Warrantless Search of the Cinderblock Building**

Hitchcock and Canen contend that evidence seized from the property should be suppressed because the search of the property was a violation of their rights under the Fourth Amendment to the United States Constitution, and Article 1, section 11, of the Indiana Constitution.

### *A. Fourth Amendment Protections*

The Fourth Amendment protects persons from unreasonable search and seizure, and this protection has been extended to the states through the Fourteenth Amendment. *Krise v. State*, 746 N.E.2d 957, 961 (Ind. 2001); *Buckley v. State*, 797 N.E.2d 845, 848 (Ind. Ct. App. 2003). The touchstone of Fourth Amendment analysis is whether a person has a “constitutionally protected reasonable expectation of privacy.” *Lundquist v. State*, 834 N.E.2d 1061, 1067 (Ind. Ct. App. 2005); *Van Winkle v. State*, 764 N.E.2d 258, 263 (Ind. Ct. App. 2002), *trans. denied*. Warrantless searches and seizures inside the home are presumptively unreasonable. *Buckley*, 797 N.E.2d at 848-49. ““An individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the home’s curtilage--the area immediately surrounding the home.”” *Shultz v. State*, 742 N.E.2d 961, 964 (Ind. Ct. App. 2001), *trans. denied*. The protection afforded curtilage is justified on the basis of needing family and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most high. *Rook v. State*, 679 N.E.2d 997, 999-1000 (Ind. Ct. App. 1997). That being said, the mere fact that a

legitimate police investigation allows items within the curtilage to be seen does not automatically transform a warrantless observation or inspection into an unconstitutional search. *Trimble v. State*, 842 N.E.2d 798, 801 (Ind. 2006).

There are limited exceptions to the warrant requirement under the Fourth Amendment. *Collins v. State*, 822 N.E.2d 214, 218 (Ind. Ct. App. 2005), *trans. denied*; see *Smock v. State*, 766 N.E.2d 401, 404 (Ind. Ct. App. 2002). A well-recognized exception to the warrant requirement is when exigent circumstances exist. *Collins*, 822 N.E.2d at 218. Under this exception, police officers may enter a residence or curtilage if the situation suggests a reasonable belief of risk of bodily harm or death, a person in need of assistance, a need to protect private property, or actual or imminent destruction or removal of evidence before a search warrant may be obtained. *Scott v. State*, 803 N.E.2d 1231, 1235-36 (Ind. Ct. App. 2004); *Harless v. State*, 577 N.E.2d 245, 248 (Ind. Ct. App. 1991).

The State bears the burden of proving that an exception to the warrant requirement exists when a warrantless search is conducted. *Collins*, 822 N.E.2d at 218. Here, the trial court heard that officers were responding to an identified citizen's concern of an odor that was burning her grandchildren's eyes and making it difficult for them to breathe. They arrived and detected that the odor was coming from a nearby cinderblock building posing a risk of bodily harm and to private property. Darling looked in the open door and saw a box fan, a liquid propane tank, and a heater that was on. Concerned that the heater and the presence of an explosive chemical like anhydrous ammonia posed a danger, Darling decided to enter the cinderblock building. The trial court found the privacy interest in the cinderblock building was minimal and that intrusion was reasonable because of the exigent circumstances

posing risk to public health.

Being properly in the cinderblock building, Darling observed camp fuel, a gas mask, stripping from lithium batteries, “pill dough,” table salt, drain cleaner, and three jars of clear liquid. These facts established a sufficient basis to find probable cause necessary to issue a warrant and search Hitchcock and Canen’s property. The evidence admitted at trial was obtained pursuant to a search under warrant. The trial court’s decision that the warrantless search of the cinderblock building was lawful did not violate Hitchcock and Canen’s Fourth Amendment rights and was not against the logic and effect of the facts before it.

### *B. The Claim under the Indiana Constitution*

Article I, Section 11 of the Indiana Constitution reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

“Although this language tracks the Fourth Amendment verbatim, we proceed somewhat differently when analyzing the language under the Indiana Constitution than when considering the same language under the Federal Constitution.” *Trimble*, 842 N.E.2d at 803. Instead of focusing on the defendant’s reasonable expectation of privacy, we focus on the actions of the police officer, concluding that the search is legitimate where it is reasonable given the totality of the circumstances. *Id.* To assess reasonableness, we consider: “‘1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion the method of the search or seizure imposes on the citizen’s ordinary activities, and 3) the extent of law enforcement needs.’” *Trimble*, 842 N.E.2d at 803 (quoting *Litchfield v.*

*State*, 824 N.E.2d 356, 361 (Ind. 2005)).

Here, Boone did not call police dispatch as an anonymous informant to report suspicious activity or the existence of a possible methamphetamine lab; instead, she called to report an odor that was irritating her grandchildren and identified herself in the process. When officers arrived later, an ammonia smell confirmed Boone's report. Although the officers initially saw no sign of the ammonia, the odor was overwhelming and the PID confirmed that there was a strong concentration of an organic compound that was causing significant irritation and that further risk to the public was possible. The trial court found that the uncertainty and the nature of the situation were exigent circumstances that warranted an investigation of the cinderblock building. Thereafter, the evidence observed within the cinderblock building gave the officer's a substantial basis to have probable cause to seek and obtain a search warrant. The trial court's decision that this warrantless search did not violate Hitchcock and Canen's rights under the Indiana Constitution was not against the logic and effect of the facts before it.

## **II. Aggravators**

A sentencing decision is within the sound discretion of the trial court. *Edwards v. State* 842 N.E.2d 849, 854 (Ind. Ct. App. 2006), *trans. denied* (citing *Jones v. State*, 790 N.E.2d 536, 539 (Ind. Ct. App. 2003)). When a trial court exercises its discretion to enhance a presumptive sentence, the record must disclose the factors the court considered to justify the enhanced sentence. *Rembert v. State*, 832 N.E.2d 1130, 1133 (Ind. Ct. App. 2005) (citing *Berry v. State*, 819 N.E.2d 443, 452 (Ind. Ct. App. 2004), *trans. denied*).

Canen argues that the trial court abused its discretion when it consider the dropped

habitual offender charge and the nature of the offense as aggravators and applied too much weight to his criminal history as an aggravator. However, regardless of the first two aggravators, we disagree that the trial court applied too much weight to his criminal history and find that it alone was sufficient to justify Canen's sentence.

Canen has five convictions: three for operating a vehicle while intoxicated; one for public indecency; and one for dealing in marijuana. This criminal history justifies the trial court's five year enhancement to Canen's sentence. The trial court did not abuse its discretion.

### **III. Appropriateness of the Sentence**

If the sentence imposed is lawful, this court will not reverse unless the sentence is inappropriate based on the character of the offender and the nature of the offense. *Boner v. State*, 796 N.E.2d 1249, 1254 (Ind. Ct. App. 2003); *see also* Ind. Appellate Rule 7(B).

We just reviewed the character of Canen as reflected in his criminal history and now look to the nature of the offense. Canen was found to have been dealing in methamphetamine based on evidence seized on his property. On the date of his arrest, his neighbor, Boone, returned home with her grandchildren. When they exited her vehicle her grandchildren's eyes were burning and they had trouble breathing because of the anhydrous ammonia emanating from Canen's property. Canen's actions in maintaining caustic chemicals on his property were with disregard for the health of the public or the welfare of the environment. Accordingly, Canen has failed to show that his sentence was inappropriate.

Affirmed.

DARDEN, J., and MATHIAS, J., concur.